NO. 47994-0-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

John R. Toney,
Appellant

v.

Lewis County, Lewis County District Court et, al, Lewis County Prosecuting Attorney's Office et, al, J. David Fine, Pamela Shirer, Just Hazel Doe, Irene Whitman, Jane Doe's 1-10, John Doe's 1-8,
Respondent's.

REPLY BRIEF OF APPELLANT

John R. Toney, appellant
9531 Barnes DR.
Castle Rock Wa. 98611
360-274-5840

Glenn Carter, WSBA # 33863
Chief Civil Deputy
J. David Fine WSBA #33362
Senior Civil Deputy, Prosecuting Attn.
Counsel for Defendants Lewis County
345 W. Main St. 2nd. Floor civil division
Chehalis Wa. 98532
360-740-1240

PM 8/22/16 Little Rock USPS

John Toney
9531 Barnes Dr.
Castle Rock, WA
98611

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ARGUMENT IN REPLY

A. THE STATUS OF HIS HONOR JUDGE EVANS

Mr. Fine's argument stating that Susie Parker (Parker) Court Administrator's letter on June 14, 2015 CP 30, was on behalf of the Lewis County Superior Court judge's whom had filed letters of recusal is without merit, and Parker enjoys no statutory authority to act without the direction of the presiding judge, and Judge Brosey's recusal estopped him from any further action in the case at hand, which would exclude Parker from any further action on behalf of Judge Brozy.

The Lewis County Superior Court web page under the heading of Administration sets forth the duties of the Superior Court Administrator :

> "The office of the Superior Court Administrator performs the executive functions to enable the judges to focus on adjudication of cases." And further states" The Administrator handles all the fiscal and logistical needs of the courts. The office provides several services in connection with the administration of justice, to wit:"
>
> Arbitration Services
>
> Public Defenders Contracts
>
> Guardian ad Litem Services

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

There is nothing within the job description that would indicate Parker has authority to act if the presiding judge fails to do so, Parker is not a Superior Court Judge or commissioner for Lewis County Washington.

> General Rule (GR) 29 (e) General responsibilities. The presiding judge is responsible for leading the management and administration of court business.
>
> GR 29 (f) Duties and Authority. The judicial and administrative duties set forth in this rule cannot be delegated to persons in either the legislative or executive branches of government. A presiding judge may delegate the performance of ministerial duties to court employees; however , it is still the Presiding Judge's responsibility to ensure they are performed in accordance with this rule.

It is further stated in:

> GR 29 (2) Assign judicial officers to hear cases pursuant to statute or rule.

Presiding Judge Brosey failed to assign or request a visiting judge to hear the case or enter an order assigning Judge Evans to hear the case as a visiting judge in Lewis County and could not by statute authorize Parker to act on his behalf, especially after judges Hunt, Lawler and Brosey's recusal CP 27,28,29, from the case due to prejudice.

> STATE EX REL, GILES V. FRENCH, 102 Wn. 273, 276, 172 P. 1156 (1918) " In such case the presiding judge shall forthwith transfer the

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case;

Presiding Judge Brosey is required both by statute RCW 4.12.040 (1) and rule GR 29 (2) to personally assign or appoint a visiting judge and enter an order to that effect, which he did not do prior to recusal, which under RCW 4.12.040 (1) would require the governor to make the assignment State Ex Rel Giles v. French 102 Wn. 273, 276, 172 P. 1156 (1918).

Mr. Fines argument with regards to a ministerial act is partially correct if it is in context of simply notification by Parker to the parties of the visiting judge and court dates **if**, (emphasis added) Parker can act without the judge's supervision, however, Fines argument has no merit under statute when the visiting judge was not obtained through Judge Brosey's authority as presiding judge or one of the other Superior Court judges acting in Judge Brosey's place, or the governor's as per statutory requirement RCW 4.12.040 (1) or GR 29 (2).

Mr. Fine quotes City of Wenatchee v. Owens 145 Wn. App. 196, 185 P. 3d. 1218, partially, the remainder is more on point:

> " If the ministerial act is mandatory, it is also termed a ministerial duty. A public official's performance of an official duty is ministerial in nature if the duty is mandatory and there is no discretion in how the act is performed."

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

Here we have a elected official, elected presiding judge with both statutory and GR requirements and a duty to appoint a visiting judge who the record is deplete in any record of Judge Brosey performing his duty prior to his recusal.

Fine's argument that venue was never change is partially correct as the case record is deplete of either party making a motion for the court to change venue RCW 4.12.080. The record is also deplete of any filing of the record with the Cowlitz County Court Clerk RCW 4.12.090 (1) and RCW 4.12.100. Therefore the case venue was properly before Lewis County Superior Court at all times and never properly before Cowlitz County Superior Court for the convenience of Judge Evans.

> RCW 4.28.020 From the time of commencement of the action by service of summons, or by filing of a complaint, or as otherwise provided, **the court is deemed to have jurisdiction and to have control of all subsequent proceedings**.(emphasis added)

Fine's argument that " Nothing in our venue statutes requires that motions be heard in the county in which a cause of action arises", is totally incorrect under RCW 4.28.020 as "all subsequent proceedings" would have been under the jurisdiction and venue of the Lewis County Superior court only.

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

B. DID JUDGE EVANS "ALLOW A NAMED PARTY TO SERVE PROCESS'?

Fine enumerates the service by mail personally made by himself and correctly identifies himself as a named defendant in the cause of action before the court, all of which Toney agrees is correct. Fine fails to state that all the documents served upon Toney by mail were each served by Fine **after** (emphasis added) Fine was a named defendant in the action.

Service of papers under Washington law is patterned after Federal Rules of Civil Procedure:

> (FRCP) Rule 5. (1) In General . Unless these rules provide otherwise, each of the following papers must be served on every party: (D) a written motion, except one that may be heard exparte;

Washington statute and court rules 4 and 5 set forth the proper service of documents for Superior Courts, and by whom service can be made,

> Farmer v. Davis 161 Wn. App. 420, 250 P 3d. 138, Proper service of process must not only comply with constitutional standards but must also satisfy statutory requirements.

Fine wearing two hats, as both defendant and counsel for the named defendant's has placed himself in a peculiar situation for service of process,

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

CR4 (c) By whom served. Service of summons and process, except when service is by publication, shall be by the sheriff of the county wherein the service is made, or by the sheriff's deputy, or by any person over 18 years of age who is competent to be a witness in the action, **other than a party**. (emphasis added).

Proper service on a defendant must comply with both constitutional and statutory requirements:

Scanlan v. Townsend 181 Wn. 2d. 838, 336, P3d. 1155, Scanlan further states that " Under CR4 (c), a valid process server can be any person over 18 years of age who is competent to be a witness in the action and who is **not a party to the action."** (emphasis added)

The purpose of the statutory and rules of service are to ascertain that the parties all receive notice of the proceedings and uniformity of judicial proceedings, constitutional requirements of **Due Process** (emphasis added) are also required, throughout the Federal and state courts all state **"not a party to the action"** of which Fine admits to being a named defendant and thus could not serve any process upon Toney.

Fine has attempted to rely upon Oregon court rules and case law to subsidize his service of legal documents as a named defendant, however under:

ORCP 7 F (2) (a) (i) ..... "that the server is a competent person 18 years of age or older and a resident of the state of service or this state and **is not a**

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

party to nor an officer, director, or employee of, *nor* attorney for any party, corporate or otherwise..... (emphasis added)"

If indeed the listed individuals cannot serve process in Oregon ruling out parties to the action and attorneys Mr. Fine and his office staff could not effect service upon Toney. It is of some interest that Fine has had office staff serve his objections to extensions of time and his reply brief which are not original process for this appeal.

C. COMPLIANCE WITH 60-DAY REQUIREMENT OF THE TORT CLAIM NOTICE STATUTE.

Fines argument regarding "the claim being denied" by Toney concerning the exhibits attached to Appellant's Amended Brief is simply a furtherance of Fine's prior lack of candor before Judge Evans RPC 3.3, as an officer of the court and licensed attorney who had full knowledge of the information contained within the exhibits, Fine had a duty to inform the court of his roll in advising the Lewis County Risk Management on what action to take on the tort claim which was the first step in the filing of the suite before the court. Fine's attempt to separate the tort claim and lawsuit are frivolous in nature and without merit, as the suite must follow the filing of a tort claim, RCW 4.92. Fine sites no legal authority or lawyer client privilege which would not allow him to disclose the Risk Managements

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

and insurer's assessment of the claim which was made well before the motion for Summary Judgment was brought before the court and their decision with assistance of attorney Fine to refuse payment of the claim and not provide a letter of denial to Toney.

Toney's position of substantial compliance with the 60 day notice requirements was meet under:

> Lee v. Metro Parks Tacoma 183 Wn.App. at 968, 335, P 3d. at 1017 (2014) and RCW 4.96.020 With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory.

Liberal interpretation of substantial compliance would eliminate a strict adherence to the 60 day rule and allow for a lesser time to be in compliance as in the case before the court.

D. CONCLUSION

The records and files of this case show the irregularity of the proceedings, that venue was improper before Cowlitz County Superior Court, Judge Evans was not sitting within Lewis County , the proper venue for the case and all preliminary hearings, Judge Evans was not appointed according to statute to act as a visiting

John Toney
9531 Barnes Dr.
Castle Rock, WA 98611
360-274-5840

judge and therefore lacked personal jurisdiction over the parties. Without personal jurisdiction of the parties and improper venue the order of Summary Judgment and denial of reconsideration should be held to be void and the matter remanded for trial de novo before a lawfully appointed visiting judge sitting within the proper venue of Lewis County Washington.

Respectfully submitted on this 22 day of August 2016.

John R. Toney. Pro se
9531 Barnes Dr.
Castle Rock Wa. 98611
360-274-5840

COURT OF APPEALS DIVISION II FOR THE STATE OF WASHINGTON

John R. Toney Appellant.	)	
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Lewis County, Lewis County District Court et, al, Lewis County Prosecuting Attorney's Office et al, J. David Fine, Pamela Shirer, Just Hazel Doe, Irene Whitman, Jane Doe's 1-10, John Doe's 1 -8, Respondent's,	)	No. 47994-0-II Affidavit of service

I Declare/Affidavit:

1. I, Sandra A. Putaansuu, am over the age of 18 years, and I am not a party to this action.

2. I served David Fine Senior civil deputy for Lewis County and attorney of record for the named defendants with the following documents by first class U.S. Mail postage prepaid on 8-22-2016: Lewis County Prosecuting Attorney's Office
345 W. Main St. 2nd. Floor, civil division
Chehalis Wa. 98532

   a. Reply Brief of Appellant

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Castle Rock, Washington on August 22, 2016.

John R. Toney
9531 Barnes Drive
Castle Rock, WA 98611
360-274-5840

Sandra A. Putaansuu
9531 Barnes
Castle Rock Wa. 98611

John R. Toney
9531 Barnes Drive
Castle Rock, WA 98611
360-274-5840